

1  
2  
3  
4 UNITED STATES DISTRICT COURT  
5 WESTERN DISTRICT OF WASHINGTON  
6 AT TACOMA

7 DAWUD HSLISI MALIK, f/k/a DAVID  
8 RIGGINS,

9 Plaintiff,

10 v.

11 HAROLD CLARKE, *et al.*,

12 Defendants.

Case No. C07-5160 RJB/KLS

ORDER DENYING MOTION TO  
AMEND COMPLAINT

13 Before the Court is Plaintiff's motion to amend his complaint. Dkt. # 72. Defendants  
14 oppose the motion on the grounds that permitting amendment at this late date in the litigation is  
15 futile and would unduly prejudice them. The Court agrees with Defendants, and for the reasons  
16 stated herein, finds that the motion should be denied.

17 **I. BACKGROUND**

18 Plaintiff filed his original complaint on March 27, 2007. Dkt. # 1. The Court's initial  
19 Pretrial Scheduling Order anticipated that discovery would be completed by October 26, 2007 and  
20 dispositive motions would be filed by November 30, 2007. Dkt. # 19. The Court ruled on  
21 Defendants' motion for summary judgment on April 15, 2008. Dkt. # 56. In the Order re-referring  
22 the case in part, the Court granted Defendants' motion for summary judgment on Plaintiff's Fifth,  
23 Eighth and Fourteenth Amendment and state law breach of contract claims. *Id.* The matter was re-  
24 referred for further proceedings on Plaintiff's claim for violation of his First Amendment right to  
25 Freedom of Speech. *Id.*, p. 7.

26 On May 7, 2008, the Court entered a Revised Pretrial Scheduling Order, setting a new

1 discovery deadline of August 8, 2008 and dispositive motions deadline of October 10, 2008. Dkt. #  
2 59. The Court granted a joint motion to extend the discovery deadline to October 7, 2008 and  
3 dispositive motions deadline to November 10, 2008. Dkt. # 68.

4 Defendants filed their motion for summary judgment on Plaintiff's First Amendment  
5 Freedom of Speech Claim on November 7, 2008. Dkt. # 70.

## 6 II. DISCUSSION

7 Leave to amend "shall be freely given when justice so requires," and "this policy is to be  
8 applied with extreme liberality." Fed.R.Civ.P. 15(a); *Morongo Band of Mission Indians v. Rose*,  
9 893 F.2d 1074, 1079 (9<sup>th</sup> Cir. 1990). After a responsive pleading has been filed, "leave to amend  
10 should be granted unless amendment would cause prejudice to the opposing party, is sought in bad  
11 faith, is futile, or creates undue delay." *Martinez v. Newport Beach City*, 125 F.3d 777, 786 (9<sup>th</sup> Cir.  
12 1997).

13 A proposed amendment that necessitates reopening discovery or that creates the need for  
14 further discovery causes undue prejudice to the opposing party. *Lockhead Martin Corp. v.*  
15 *Networth Solutions, Inc.*, 194 F.3d 980, 986 (9<sup>th</sup> Cir. 1999). Although the amendment rules are  
16 liberal, they do not require that courts indulge in futile gestures. *Deloach v. Woodley*, 405 F.2d 496,  
17 497 (5<sup>th</sup> Cir. 1968). If a proposed amendment could not withstand a motion to dismiss, a court is  
18 justified in denying a motion to amend the pleadings made pursuant to Rule 15(a). *Jones v.*  
19 *Community Redevelopment Agency of City of Los Angeles*, 733 F.2d 646 (9<sup>th</sup> Cir. 1984); *Glick v.*  
20 *Koenig*, 766 F.2d 265 (7<sup>th</sup> Cir. 1985).

21 The Court finds that Plaintiff's motion to amend his complaint should be denied as  
22 untimely, prejudicial and futile.

23 This case was filed almost two years ago and since that time, discovery was conducted and  
24 the Court issued rulings on dispositive motions. On April 15, 2008, the Court re-referred this case  
25 for additional discovery and decision on Plaintiff's First Amendment claim only. Dkt. # 56. At

1 that time, new deadlines were put in place, including a dispositive motions deadline. Dkt. # 59.  
2 That deadline was extended by the Court at the joint urging of the parties. Dkt. # 66. However,  
3 Plaintiff waited until November 25, 2008 to file his motion to amend. Dkt. # 72.

4 Plaintiff's proposed amendment alleges a state law breach of contract claim asserting that  
5 Defendants' actions violated his rights under a settlement agreement entered into in 1996. Dkt. #  
6 79, pp. 8-9. He states that he had to await answers to discovery before bringing such a claim. Dkt. #  
7 79, pp. 3-4<sup>1</sup>. However, Plaintiff also states that he knew as early as April 3, 2007 that he was  
8 expected to adhere to the retroactive DOC policy. *Id.*, p. 4. In October 2007, the Court  
9 recommended denial of Defendants' motion to dismiss on the grounds that Plaintiff's lawsuit was  
10 based on allegations of violations of his constitutional rights, not contractual rights. Dkt. # 39.

11 In July 2007, Defendants moved to dismiss Plaintiff's complaint, arguing that the Court  
12 lacked subject matter jurisdiction because Plaintiff's claims are based on violations of the  
13 settlement agreement reached between the parties after *Malik v. Brown*, 16 F.3d 330 (9th Cir. 1994)  
14 (Malik I), *mandate recalled*, 65 F.3d 148 (9th Cir. 1995) (Malik II), *appeal after remand*, 71 F.3d  
15 724 (9th Cir. 1995) (Malik III), relief for which lies solely in state court. *Id.* In defending the  
16 motion to dismiss, Plaintiff argued that the settlement agreement was "secondary" to the violation  
17 of his federal rights. Thus, Plaintiff was aware of the nature and lack of sufficiency of any state  
18 contractual claim well over one year ago.

19 In addition, Defendants were granted summary judgment on Plaintiff's state law contractual  
20 claim in April 2008 because he failed to assert or factually allege the violation of any state laws in  
21 his complaint. Dkt. # 56.

22 Defendants also argue that Plaintiff's proposed amendment to add the Department of

---

23  
24 <sup>1</sup>Plaintiff also states that he filed a motion to compel on October 8, 2008. Plaintiff filed a  
25 "Response to Defendant's Motion of Failure to Produce Documents Requested." Dkt. # 69.  
26 However, the documents was not filed as a motion, was not noted on the Court's calendar, and  
contained no proof that it was served on defense counsel. *Id.*

1 Corrections as a defendant is futile at least to the extent that Plaintiff seeks damages against the  
2 Department of Corrections (DOC) as the Eleventh Amendment bars suits for damages against the  
3 state in federal court. The Eleventh Amendment to the United States Constitution bars citizens  
4 from bringing lawsuits against states in federal courts. *See Welch v. Texas Dep't of Highways and*  
5 *Pub. Transp.*, 483 U.S. 468, 472-73 (1987) (plurality opinion); *Edelman v. Jordan*, 415 U.S. 651,  
6 662-63 (1974). Eleventh Amendment immunity extends to state agencies such as DOC.

7 In any event, the addition of the DOC as a new party will require the reopening of  
8 discovery, thus delaying these proceedings unnecessarily at this late stage of the proceedings. *See,*  
9 *Lockhead Martin Corp. v. Network Solutions Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) (a need to  
10 reopen discovery and delay in proceedings supports finding that amendment would prejudice  
11 opposing party).

12 The dispositive motion deadline of November 10, 2008, a date which the parties chose and  
13 which Defendants have met in a timely manner, has now passed. Plaintiff has been on notice for  
14 over a year that the Court was dismissing his state law contractual claim for failure to assert or  
15 factually allege the violation of any state laws in his complaint. Permitting an amendment which  
16 brings in an additional party at this late date after the Court has engaged in substantive rulings and  
17 after the parties have engaged in discovery and motions practice will unduly delay this case and  
18 impose an unfair burden on Defendants.

### 19 III. CONCLUSION

20 Accordingly, Plaintiff's motion to amend his Complaint (Dkt. # 72) is **DENIED**. The Clerk  
21 is directed to send copies of this Order to Plaintiff and to counsel for Defendants.

22 DATED this 7th day of January, 2009.

23   
24 Karen L. Strombom  
25 United States Magistrate Judge